

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 1303 of 1999****For Approval and Signature:****HONOURABLE MR.JUSTICE A.L.DAVE****HONOURABLE MR.JUSTICE SHARAD D.DAVE**

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
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RAYSANGBHAI MOTIBHAI PARMAR & 5 - Appellant(s)**Versus****STATE OF GUJARAT - Opponent(s)**

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Appearance :

MR KB ANANDJIWALA for Appellant(s) : 1 - 6.

Mr.P.D.Bhate, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE**and****HONOURABLE MR.JUSTICE SHARAD D.DAVE****Date : 17/04/2007****ORAL JUDGMENT****(Per : HONOURABLE MR.JUSTICE A.L.DAVE)**

1. The appellants came to be tried by the Sessions Court, Bharuch in Sessions Case No.78 of 1999 for forming an unlawful assembly and object to commit murder of Laxmiben w/o Ganpatbhai and thereafter in furtherance of that common object, committed murder of Laxmiben on 2.12.98 at about 9.00 a.m., near Talavadi (small pond) in the outskirts of village Malpur.

2. It is the case of the prosecution that deceased Laxmiben w/o Ganpatbhai had a quarrel with the accused side on 1.12.98. Aggrieved thereby, the appellants formed an unlawful assembly and in furtherance thereof, committed murder of deceased Laxmiben at about 9.00 a.m., on 2.12.98 near Talavadi. It is alleged that appellant no. 1 Rayasangbhai Motibhai, appellant no.2 Chandubhai Bhaijibhai, appellant no.3 Laxmanbhai Bhaijibhai, appellant no.4 Maganbhai Chhotubhai were armed with axe, whereas appellant no.5 Ramanbhai Laxmanbhai and appellant no.6 Dalpatbhai Laxmanbhai were armed with stick. It is also the case of the prosecution that on that day, the deceased along with her son Chhatrasang had gone to the field for cutting grass and she was returning with a bundle of cut grass on her head when she was intercepted by the accused persons and assault was committed. She sustained injuries on various parts of her body and ultimately succumbed to the same. At the time of the incident, son of deceased Chhatrasang as well as Devjibhai Karsanbhai and Amarsangbhai Karsanbhai were present and saw the

incident. The first information was lodged by Chhatrasang on basis of which the offence was registered and after the investigation, charge sheet was filed. The trial Court framed charge at Exh.1 against all of them to which all the accused pleaded not guilty and claimed to be tried.

2.1. The trial Court, after considering the evidence led by the prosecution, came to a conclusion that the prosecution was successful in establishing the charge against the accused persons and recorded the conviction for offences punishable under Sections 302, 143, 147, 148 and 149 of the Indian Penal Code and Section 135 of the Bombay Police Act. The trial Court, awarded punishment of imprisonment for life to the accused and hence this appeal.

3. We have heard learned advocate Mr.K.B.Anandjiwala and learned A.P.P.Mr.Bhate.

4. Learned advocate Mr.Anandjiwala has raised the following contentions :

4.1. That the time of incident could not be 9.00 a.m., as is sought to be projected by the prosecution. He submitted that the medical evidence indicates that stomach of the deceased was empty when the postmortem was performed. It has also come in evidence that if the deceased had taken food about two hours prior to the incident, semi digested food would have been found in the stomach. He also

submitted that the postmortem indicates presence of foecal material in the rectum which would mean that the deceased had not attended to her routine morning nature's call. The incident may have happened much earlier and not at the time and place and in the manner described by the so called eye witnesses.

4.2. Mr.Anandjiwala submitted further that the place of incident has to be different. He submitted that it is the case of the prosecution that the deceased was assaulted upon when she was returning with a bundle of cut grass on her head. If that is so, such bundle ought to have been found at the place of incident which was missing. The panchanama is silent so also the police officer has admitted that no such bundle was there. Mr.Anandjiwala submitted that no traces of blood were found at the place of incident. Similarly, it is noticed that the face of the deceased was covered with mud whereas there is no evidence about the presence of mud at the place of incident and therefore, the incident must have occurred at some other place.

4.3. It is submitted that the FIR is not rival and it cannot be considered as FIR because it has come in evidence that Jambusar police was informed about the incident prior in point of time and Jambusar police in turn sent a messenger to Kavi.

4.4. It is submitted that Chhatrasang could not have been eye witness to this incident. He submitted

that the original reason is tried to be suppressed by the prosecution. Therefore, the appeal may be allowed.

4.5. Alternatively, it was contended that it has come in medical evidence that the injury found on person of the deceased was not sufficient in ordinary course of nature to cause death. There are only four injuries noticed by the doctor, one of which is attributed to a stick blow. Out of remaining three injuries, only one injury is found to be fatal and the appellants have a good case to make out. However, the medical evidence also indicates that injuries were not sufficient in ordinary course of nature to cause death and was, therefore, submitted that even if the prosecution case is accepted as it is, it would not fall under the definition of murder. It would be only a culpable homicide not amounting to murder or may be grievous hurt and benefit be given to the appellants. He submitted that the appellants nos. 1 to 4 are in prison whereas the appellant nos. 5 and 6 have been enlarged on bail by the order of this Court dated 22.12.99.

5. Learned APP Mr.Bhate has opposed this appeal. According to him, there are three eye witnesses to the incident. Of course, one of them has not supported the prosecution case but presence of Chhatrasang is natural and his evidence cannot be discarded only on the ground that he happens to be son of the deceased. He submitted that there was no

quarrel, no dispute, no altercation at the time of incident and straightaway the assault is committed. He submitted that conduct of all the six is such that though assault was committed, none tried to intervene meaning thereby that they are all party to the conspiracy. It has also come on evidence that there was a dispute or a quarrel in the previous evening on account of fetching of water which had annoyed the appellants and ultimately led to the present incident.

5.1. When attention of learned APP was drawn towards the medical evidence, he conceded that the doctor's evidence does not specifically indicate that the injuries sustained by the deceased were sufficient in ordinary course of nature to cause death. On the contrary, the doctor has admitted that the main injury which was found on the forehead of the deceased was not sufficient to cause death. He submitted that the injury is caused on the vital part of the body and with an axe which has resulted into the death and, therefore, it would be a case of murder.

6. We have gone through the record and proceedings keeping in light the contentions raised by the rival sides.

7. P.W.1 is Chhatrasangbhai Ganpatbhai at Exh.12. He is the son of the deceased. He states that on 1.12.98, his mother deceased Laxmiben had a

quarrel with accused no.3 Laxmanbhai Bhaijibhai and accused no.2 Chandubhai Bhaijibhai regarding water. The dispute was over by intervening of neighbours. On the next morning i.e. 2.12.98, he along with his mother went to the field at about 7.30 a.m., and were returning home at around 9.00 a.m., with bundle of cut grass. He says that when they were passing by the Talavadi, the accused persons met them. Raysangbhai Motibhai, Chandubhai Bhaijibhai, Laxmanbhai Bhaijibhai, Maganbhai Chhotbhhai were armed with axe whereas accused nos. 5 and 6 Ramanbhai Laxmanbhai and Dalpatbhai Laxmanbhai were armed with stick. They started quarreling with his mother stating as to why she had quarreled with them the previous evening and then accused no.1 - Raysangbhai Motibhai, accused no. 3 - Laxmanbhai Bhaijibhai inflicted axe blows on the head of Laxmiben whereas accused no.4 - Maganbhai Chhotubhai and accused no.2 Chandubhai Bhaijibhai inflicted blows with the hind portion of the axe and accused nos. 5 - Ramanbhai Laxmanbhai and accused no. 6 - Dalpatbhai Laxmanbhai inflicted stick blows. The witness states that he raised shouts and on hearing shouts Devjibhai Karsanbhai and Amarsing Shankarbhai arrived. The witness says that the accused persons started beating him and, he, therefore, ran away and informed his father and Dhulabhai and Abhesing. Thereafter, the witness, his father and Dhulabhai went to Talavadi to look for the deceased. She was lying there profusely bleeding with injuries on her head, her right eye and left ear. She had in fact expired. The witness says that they, therefore,

informed Thakorebhai of village Nada who in turn gave information to the police. He says that they took the deceased to Jambusar government hospital and Thakorebhai lodged a complaint. He says that he and Thakorebhai went to the police station together and Thakorebhai gave the complaint. He says that all details were given by Thakorebhai in the police and he was not asked anything. He recognized his signature at mark 11/1 and states that he has put his signature at the police station. He then goes to identify the accused and the weapons.

7.1. The witness has been cross-examined extensively. After answer to certain peripheral questions, during cross-examination, the witness states that they were not cutting grass at the place of incident. He says that he and his mother were walking near the road and both had bundle of cut grass on their head. He says that on blow being given to his mother, the bundle on her head fell down. She fell down on the floor on first blow falling on her with axe. He says that he started shouting and threw away the bundle. Because of his shouts, the assailants turned on him and he ran towards the town. He says that then he reached home and his father was at home. It was around 11.30 to 12.00. He says that they reached the police station at around 5.30 in the evening. The police had come to the town in the afternoon and the panchanama in this regard was drawn. During cross-examination, he admits that he and his mother had break-fast before leaving for the

field. Thakorebhai is his father's younger brother. He admits that there were two telephone booths in the town but denies that a false case is stated at the instance of Thakorebhai.

7.2. P.W.2 Devjibhai Karshanbhai is at Exh.30. He is also projected as an eye witness by the prosecution. However, he does not support the case of the prosecution wholly and is declared hostile. He goes with the prosecution to the extent that Chhatrasang met him and told him that his mother is murdered and, thereafter, he along with Chhatrasang and Amarsang went to the place of incident. He states that he had seen the accused persons. He had seen Laxmiben also but he is unable to say as to who gave blow with which weapon. During cross-examination, he admits that he had a dispute with Sursang Madhavsang who happens to be maternal uncle of accused nos. 1 and 4. He also admits that Ganpatbhai, father of Chhatrasang is his brother-in-law. He admits that he has developed cataract. He says that when he went to the place of incident, he saw bundles of grass. He admits that he has stated in his police statement that all six persons intimidated him and told him that he should leave quietly from the place or else they would meet the same fate. He denies the suggestion that he has not seen the incident.

7.3. P.W.3 Amarsang Shankarbhai is examined at Exh.14. He is resident of Malpur and is an agriculturist. The incident occurred on 2.12.92

wherein Laxmiben expired. He says that on the previous day, she had a quarrel with Laxmanbhai Bhaijibhai. He says that on the day of incident, he along with his wife had gone to his field at about 6.00 a.m. He says that after preparing bundle of cut grass, he sent his wife back home and he went towards his other fields and while he was returning from there, Devjibhai met him. They both came near the field of Ganpatbhai together. He saw Chhatrasang and his mother going ahead of him and they had bundle of grass on their head. He says that after some time, the accused persons had quarreled with Laxmiben and Laxmiben was being beaten by accused persons. He says that accused Raisangbhai, Laxmanbhai, Maganbhai and Chandubhai were armed with axe, whereas Dalpatbhai and Ramanbhai were hitting the deceased with stick. Laxmiben sustained injury on her head just below left ear, on the side of the eye and on the back of the head. He says that seeing the assault, he ran away and dead body remained there at the place only. He says that after returning home, Devjibhai informed other relatives of Laxmiben and thereafter, the FIR was lodged by Chhatrasang.

7.4. The witness is subjected to cross-examination. He admits that accused no.3 Laxmanbhai and accused no.2 Chandubhai are his cousins. He states that first blow was given on the neck of the deceased as a result of which the bundle fell down so also Laxmiben. Her son started shouting. He says that he did not go for her rescue. On topography, he says

that dead body was lying at a distance of 100 steps from the field of Ganpatbhai. He admits that his relations with his cousins are not smooth and dispute is going on.

7.5. The evidence of Dr. Baldevbhai Shankarbhai Darji is at Exh.15. This doctor had performed the postmortem and he had noticed following injuries :

"1. An incised cut wound in mid-forehead frontal region, 5 cm x 2 cm x 1 cm of frontal bone, brain material coming out.

2. An incised cut wound on Rt.eyeball laterally 1 cm x 0.5 cm x 0.5 cm skin and muscle deep.

3. Two incised cut wound anterior to Lt.ear (face)

(i)3 cm x 1cm x 1cm bone deep.

(ii)2 cm x 2 cm x 1 cm. Bone deep.

4. An abrasion of Rt.upper eyelid laterally 0.5 cm x 0.5 cm size skin epidamisis."

According to the doctor, the cause of death of the deceased was cerebral hemorrhage due to injuries. He says that injury no.1 is possible with muddammal axe. The doctor says that the injury to the brain was sufficient in ordinary course of nature to cause death. During cross-examination, however, the doctor

says that he has not noticed any injury on the brain of the deceased. He also says that if any blow is given with force, there would be presence of some other open injury to the brain where from fluid may come out. He says that he has not noticed any such injury. He admits that it is not necessary that cerebral hemorrhage would always result into death. He further admits in his cross-examination that fracture of skull bone is not sufficient in ordinary course of nature to cause death.

7.6. Panch witness Haribhai Chhitabhai Exh.20 states that he had gone to the place of incident and was witness to the drawing of inquest panchanama. He says that the face of the deceased had blackened and there was mud over it. He says that the place of incident is near Talavadi and there was mud around. He changes his version in the next minute and says there there was no mud.

7.7. The panch of place of incident is Ramsingbhai Mohanbhai Exh.23. He says that around the place where the dead body was there, there was mud. He also speaks of blood stained soil being collected by the police.

7.8. The witness Thakorebhai Chhaganbhai Exh.25 states that he was at village Nada on 2.12.98. He received a telephone from Devjibhai Karshanbhai around 10.30 from village Malpur that Laxmiben Ganpatbhai has expired and that she is murdered. He

was informed that they were not able to contact Kavi Police Station from Malpur and, therefore, police may be informed from village Nada. He, therefore, went to the house of Ghanshyam Pandya and informed Jambusar police about the incident. He says that his statement is recorded on 3.12.98.

7.9. P.W.9 Ganpatbhai Mathurbhai Exh.26 is the husband of the deceased. His deposition hardly throws any light on the incident.

7.10. P.W.10 Bhavsingbhai Nathubhai Vaghela Exh.29 is Circle Inspector who prepared the map of place of incident. The map is at Exh.31.

7.11. P.W.11 Usman Allibhai Exh.32 is the panch witness to the so called discovery panchanama by the accused. He has not supported the prosecution case and is treated hostile.

7.12. Constable Bhimsinh Himmatsinh Exh.34 was the P.S.O. At Kavi Police Station. He says that the FIR was sent to him by P.S.I.S.D.Rathor around 5.20 p.m. On the basis of which he registered the offence. He states that he received some telephone from Jambusar that a quarrel has taken place at Malpur. He, therefore, informed P.S.I. S.D.Rathod and P.S.I., Rathod in turn rushed to Malpur with police.

7.13. Investigating Officer Sajidkhan Dilavar Rathod is at Exh.36. He says that on 2.12.98, around

2.15 p.m., P.S.O. Bhimsinh informed him that a phone is received from Jambusar police station that a quarrel has taken place at village Malpur and, therefore, he rushed to Malpur. He went to the panchayat office and found many persons having gathered and learnt about murder of wife of Ganpatbhai. Chhatrasang was present. Therefore, FIR was recorded. Then he proceeds on to narrating how the investigation was done.

7.14. The FSL report indicates that the clothes of the deceased had blood stains of human blood group 'A'. All four axes had human blood on it but the group was not identifiable.

8. If the above evidence is seen, what is remarkable is that out of three eye witnesses, independent eye witness Devjibhai Karshanbhai has not supported the prosecution case. According to P.W.1 Chhatrasangbhai Ganpatbhai and P.W.3 Amarsang Shankarbhai, all persons committed assault on the deceased with their respective weapons. However, the medical evidence does not support this version. On the dead body, the doctor has noticed only four injuries. Except injury no.1 which is found on the forehead, the other three injuries can be considered as non-fatal and not of a serious nature. Who caused which injury is not brought on record by the prosecution. Strictly speaking, it may not be necessary to prove this when there is a charge of unlawful assembly. But what we emphasize is that the

story that is narrated by the eye witness is not supported by medical evidence. Accused no.5 and 6 are alleged to be armed with stick whereas there is not a single injury which can be attributed to hard and blunt weapon.

9. The eye witnesses have stated that injury was caused with hind portion of axe on the back of the deceased whereas no such injury is noticed or recorded by the doctor who performed the postmortem. The evidence of these witnesses require scrutiny for the reason that Amarsang Exh.14 has admitted in his cross-examination that he has enmity with the accused Laxmanbhai and his sons Ramanbhai and Dalpatbhai.

9.1. It has also come in evidence of Amarsang that the first blow was given on back of the neck which injury is not found at all on the dead body by the doctor.

10. The FIR which is given by P.W.Chhatrasang is undisputedly dictated not by Chhatrasang but by Ganpatbhai - his father. Likewise, it has come in evidence of Chhatrasang that Thakorebhai gave a complaint immediately after the incident which is not coming on record.

11. Our attention is drawn to the fact that even as per the prosecution case, the FIR was registered at 5.30 p.m. Before that, panchanama of place of incident and the inquest panchanama were prepared. We

notice that in these two panchanamas, there is a reference to the Crime Register number which could not have been there if they were prepared prior to the registration of the offence or if the registration was done after the panchanama was prepared. Either way, this reflects that the investigation did not proceed in the manner in which it is projected to have proceeded.

12. We also notice that as per the say of Chhatrasang, he and his mother had started from home around 7.30 in the morning. They had taken break-fast whereas the incident occurred at about 9.00 a.m., i.e., within an hour and half. The postmortem note indicates that the stomach was empty. The doctor has stated that if food was taken within two hours prior to the incident (death of the deceased), there would have been undigested food in the stomach. This means that the deceased had not taken break-fast. Possibility of the incident having occurred not in the manner in which it is indicated cannot be ruled out.

13. The conduct of Chhatrasang also is little strange. He instead of intervening or rescuing his mother, escapes from the place. He says that he has raised shouts, but surprisingly no one comes to his rescue. This, by itself, may not be of significance. Different persons react difficulty to a given situation. But when the deposition of the witness as a whole is taken and it is found that there are

number of discrepancies, improvements and omissions, we have to be slow in accepting such deposition, particularly when the evidence in form of circumstances namely the injuries and other surrounding aspects does not support this witness and when it is found that the witnesses are not independent and have some grievance against the accused.

14. We also find that as per the prosecution case, the deceased and P.W. 1 Chhatrasang were returning with bundle of grass on their head, they also had sickle with them but these bundles are not found at the place of incident as can be seen from the deposition of panch witnesses. The deposition of Investigating Officer Exh.36 makes it clear that neither bundle of grass nor sickles were found at the place. He also states that when they went near the dead body, no body was around.

14.1 We, however, do not find any substance in contention that blood was not found at the place of incident. The panchnama makes a specific reference to presence of blood at the place of incident. The contention is, therefore, rejected.

15. From the above discussion, we are of the view that the version of the eye witnesses does not inspire confidence. The FIR is lodged late. The version is not supported by medical evidence. There is animosity between the accused and the witnesses.

The evidence taken as a whole does not rule out the possibility of incident having occurred in a different manner than what prosecution has projected. Even the investigation is also not beyond a shadow of doubt when it is found that the panchanama drawn prior to the registration of offence carry the number of the crime register. We also notice that there are a number of injuries which are recorded in the inquest panchanama whereas the P.M.Notes are silent on it and no explanation in this regard comes from the prosecution. It could be understood if more injuries were noticed by the doctor performing P.M., he being an expert. But absence of certain injuries in P.M.notes recorded at the time of inquest, raises doubt certainly on manner of investigation. This would also reflect on the manner in which the investigation is carried out. We are of the view that the case against the appellants cannot be said to have been proved beyond reasonable doubt. The whole story reels under a shadow of doubt and benefit, therefore, has to go to the appellants - accused.

16. Under the circumstances, this appeal is allowed.

17. The judgment and order passed by the learned Sessions Judge, Bharuch on 22.11.99 in Sessions Case No.78 of 1999 is set aside. The bail bonds of appellant nos. 5 and 6 shall stand cancelled. Appellant nos. 1 to 4 be set at liberty forthwith, if not required in any other case.

(A.L.DAVE, J)

(SHARAD D DAVE, J)

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